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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 38

TRANSPORTATION-COMMUNICATION EMPLOYEES UNION,
Petitioner,

v.

UNION PACIFIC RAILROAD COMPANY, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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October 7, 1965

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STATUTES

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No.

TRANSPORTATION-COMMUNICATION EMPLOYEES UNION,[1]
Petitioner,

v.

UNION PACIFIC RAILROAD COMPANY, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Transportation-Communication Employees Union prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in this case on July 22, 1965.

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[1] On September 1, 1965, the Court of Appeals granted Petitioner's motion to amend the name of the appellant in the caption of the case from "The Order of Railroad Telegraphers" to "Transportation-Communication Employees Union" to conform with the Union's change in name.

OPINIONS BELOW

The opinion of the District Court (R. 9-16)[2] is reported at 231 F. Supp. 33. The opinion of the Court of Appeals (Appendix A, *infra*) has not yet been officially reported. It is unofficially reported at 59 LRRM 2993.

JURISDICTION

The judgment of the Court of Appeals was entered on July 22, 1965, and is appended hereto as Appendix B, *infra*. Jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTION PRESENTED

Whether the National Railroad Adjustment Board may determine a dispute arising from a claim that a railroad has assigned work in violation of a collective bargaining agreement without a determination of the rights of other employees represented by another union to whom the work was assigned, where the other union was given notice of the proceeding before the Adjustment Board and declined to participate, and where the other union has not filed a claim with the Adjustment Board?

STATUTES INVOLVED

The pertinent provisions of the Railway Labor Act (48 Stat. 1185, 45 U.S.C. §§ 151-164) and the Labor Management Relations Act (61 Stat. 136, 29 U.S.C. §§ 151-168) are set forth in Appendix C, *infra*.

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[2] "R" denotes the "Transcript of Record" as filed in the Court of Appeals. One certified and nine uncertified copies have been filed with the Clerk of this Court for use in the consideration of this petition for a writ of certiorari.

STATEMENT

This action was brought by the Transportation-Communication Employees Union (formerly "The Order of Railroad Telegraphers" and herein referred to as "TCU") against the Union Pacific Railroad Company (herein referred to as the "Railroad") to enforce an Award and Order of the National Railroad Adjustment Board, Third Division (herein referred to as the "Adjustment Board"). **(R. 1-4)**

The TCU, as the duly authorized and designated representative under the Railway Labor Act of the craft or class of employees commonly known as "Telegraphers" (R. 2), filed a claim with the Adjustment Board that the Railroad had violated the collective bargaining agreement between the parties by not assigning the operation of certain machines in the Railroad's yard office in Las Vegas, Nevada, to employees represented by TCU. The Railroad had assigned the work to employees represented by the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes (herein referred to as the "BRC"). **(R. 2-3)**

The Adjustment Board notified the BRC of the pendency of the proceedings, the date set for the hearing, and that the BRC would be permitted to appear and participate. (R. 7-8) The BRC's reply to the Adjustment Board was that the controversy before the Adjustment Board concerned a dispute between the Railroad and the TCU over an interpretation of the agreement between those two parties, that the BRC was not involved in that dispute, and that it would not participate in the proceedings before the Adjustment Board. (R. 8-9)

The Adjustment Board, thereafter, considered the merits of TCU's claim and on July 14, 1961, issued Award No. 9988 and an accompanying Order sustaining the TCU's claim and directing the Railroad to make the Award effective. (R. 4) The Railroad refused to comply with the Award and Order of the Adjustment Board, whereupon this action was brought.

On September 13, 1963, the Railroad filed a motion to dismiss TCU's complaint (R. 5) setting forth three grounds, the first two of which were denied by the District Court. (R. 10) The substance of the third ground for dismissal, which was sustained by the District Court, was that TCU had failed to name an indispensable party, namely BRC, to the enforcement action. The District Court dismissed the complaint with leave for TCU to file, within 30 days of the Order, an amended complaint making BRC a party to the action. (R. 16) TCU did not make BRC a party and on September 30, 1964, the District Court granted Railroad's motion and entered a final judgment of dismissal dismissing the complaint. (R. 17-18)

On appeal, the Court of Appeals did not pass on the sole question presented before it, namely, whether BRC was an indispensable party to the enforcement action, but instead vacated and set aside the Order of the Adjustment Board, and remanded the case to the District Court with instructions to remand it to the Adjustment Board for further proceedings. (Appendix B, *infra.*)

The Court held that the dispute before the Adjustment Board involved a jurisdictional dispute between TCU and BRC involving a question of which group of employees was entitled to perform certain work, that BRC "for all practical purposes" became "parties"

to the Adjustment Board proceeding, and that the Adjustment Board was required to exercise its jurisdiction "over the whole dispute at one time." The Court concluded:

> "Thus it is necessary that the case be remanded to the Board in order that a complete hearing may be had to include all issues, practice, and usage, including the effect of the Clerks' contentions and contract, which are necessary to a complete disposition of the dispute as to all concerned parties .... When a Board hearing is so held, and if proper notice be given to the Clerks, they would be bound by the Board's findings and order."

REASONS FOR GRANTING THE WRIT

I. The National Railroad Adjustment Board Did Not Err in Determining the Claim of TCU Without Determining the Rights of Employees Represented by BRC

The Court of Appeals held that the Adjustment Board could not determine the dispute arising from a claim that the Railroad had assigned work in violation of a collective bargaining agreement between it and TCU without a determination of the rights of employees represented by BRC to whom the work was assigned, even though BRC was given notice of the proceedings before the Adjustment Board and declined to participate, and even though neither BRC nor the Railroad had filed a claim with the Adjustment Board concerning the meaning of their agreement. We know of no other case in which a court has ruled on this issue. To the extent that this Court has considered this issue, however, the conclusions drawn by this Court are contrary to the decision of the Court of Appeals.

The Court of Appeals viewed this case as involving a jurisdictional dispute between two groups of em-

ployees, one represented by TCU and the other represented by BRC, as to which group is entitled to perform certain work. The Court was of the opinion that although the claim before the Adjustment Board pertained only to an alleged violation of an agreement between TCU and the Railroad, with TCU seeking damages for the alleged breach of such agreement, the nature of the claim resulted in BRC "for all practical purposes" becoming a party to the administrative proceedings and required the Adjustment Board to exercise authority "over the whole dispute at one time" and to adjudicate the rights of the employees represented by BRC as well as those represented by TCU,—a ruling not urged by any of the parties, either before the Adjustment Board or in the courts below.

The Court of Appeals concluded that the prior proceeding before the Adjustment Board was incomplete and directed the District Court to remand the case to the Adjustment Board with directions for further proceedings "which [are] necessary to a complete disposition of the dispute as to all concerned parties." The Court added that "When a Board hearing is so held, and if proper notice be given to the Clerks [BRC], they would be bound by the Board's findings and order."

Thus, the Court of Appeals held that since TCU's claim involved a dispute over an assignment of work the Adjustment Board had jurisdiction to determine and was required to determine, not only whether the Railroad had breached its agreement with TCU but was constrained to determine the rights of employees represented by BRC.

It is TCU's position, however, that the jurisdiction of the Adjustment Board does not extend to a deter-

mination of the rights of employees under an agreement which is not the subject of a claim before the Adjustment Board. The jurisdiction of the Adjustment Board in a dispute such as is involved here is limited to determining claims that one of the parties to a collective bargaining agreement has breached the agreement and, if such breach is found, directing an appropriate remedy. This is precisely what the Adjustment Board did in the present case. The Adjustment Board sustained the claim of TCU that under its agreement with the Railroad, the Railroad should have assigned employees represented by TCU to perform the work in question and awarded the employees damages for breach of the agreement.

Thus, while the Adjustment Board might have found it relevant and helpful to consider other evidence such as usage, practice, and custom in the railroad industry, and the agreement between the Railroad and BRC, such evidence would have relevance only for the purpose of shedding light on the interpretation to be given to the agreement between the Railroad and TCU which formed the basis of the claim. The existence of such evidence, including the agreement between BRC and the Railroad would not, contrary to the holding of the Court of Appeals, make BRC "in effect" a party to this action nor would it affect any contractual rights that employees represented by BRC may have. Until such time as a claim under the BRC agreement is filed with the Adjustment Board, the Adjustment Board would not have jurisdiction to determine rights under that agreement.

It is important to note that this case does not present the issue of whether BRC is "involved" in the dispute within the meaning of § 3 First (j) of the Railway

Labor Act, 45 U.S.C. § 153(j) (Appendix C, *infra*), and therefore whether notice of the proceedings before the Adjustment Board must be given to BRC. Although this Court has never ruled even on this issue,[3] such issue is not presented herein because notice to the BRC of the proceedings before the Adjustment Board was in fact given.

Furthermore, this case likewise does not involve a question of whether the Adjustment Board could consider evidence relating to any agreements between the Railroad and BRC as well as evidence concerning practice, custom, or usage which would be relevant to the issue before the Adjustment Board. The Railroad has not contended it was not given an opportunity to present any evidence it chose in the proceedings before the Adjustment Board nor is there any indication that the Adjustment Board refused to consider any evidence.[4]

The issue here is whether, upon consideration of all relevant evidence, and notice given to BRC, TCU is entitled to a determination by the Adjustment Board of its claim that the Railroad breached its agreement by not assigning certain work to employees represented by TCU. The Adjustment Board found that it had jurisdiction to determine the dispute, and did so. The Railroad did not question the jurisdiction of the Adjustment Board to make the determination, BRC

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[3] See *Whitehouse* v. *Illinois Central R.R.*, 349 U.S. 366, 370-373 (1955).

[4] There is nothing in the record to support the statement by the Court below (Appendix A, *infra*, p. 6a) that:

> "Other contracts for what appeared to be the same jobs were excluded by its [Adjustment Board's] rules of evidence."

raised no objection, and the District Court found no fault with the Adjustment Board's determination. It was not until the decision of the Court of Appeals that the determination of the Adjustment Board was brought into question and a holding made that the Adjustment Board did not exercise its jurisdiction properly,—a holding not urged by any of the parties.

Neither the provisions of the Railway Labor Act nor cases construing the Act support the Court of Appeals' holding.

The jurisdiction of the Adjustment Board is set forth in § 3 First (i) of the Railway Labor Act, 45 U.S.C. § 153 First (i) (Appendix C, *infra*), and is confined to:

> ". . . disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions . . . ."

There is no provision in the Act authorizing a union to file a claim with the Adjustment Board that it is entitled to the assignment of work except in the form of a claim that a railroad breached an agreement by not assigning the work in question to employees it represents, nor would the Adjustment Board have jurisdiction to determine such dispute except in such form.[5]

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[5] The situation is completely different under the Labor Management Relations Act (LMRA). Under § 10 (k) of that Act, 29 U.S.C. § 160 (k) (Appendix C, *infra*), the National Labor Relations Board (NLRB) specifically is charged to "hear and determine" jurisdictional disputes. This Court has held that such mandate requires the NLRB to make a decision "that one or the other [group of employees] is entitled to do the work in dispute." *National Labor Relations Board* v. *Radio and Television Broadcast*

The Court of Appeals considered its determination required by precedent but, as will be shown below, the cases relied upon by the Court were not concerned with nor even mentioned the issue presented in this case. We know of no cases where a Court has ruled on such issue, and in the only case, also to be discussed below, in which this Court considered the issue herein, the Court took a position diametrically opposed to that taken by the Court of Appeals.

The *Pitney*[6] and *Slocum*[7] cases relied upon by the Court of Appeals are not determinative of the issue herein. The issue in each of those cases was whether a court had primary jurisdiction to entertain a suit alleging a breach of collective bargaining agreements between a railroad and a union involving an assignment of work. In *Pitney,* action was brought in the federal courts, and in *Slocum,* suit was filed in the

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Engineers (Columbia Broadcasting System), 364 U.S. 573 (1961). This Court stated (at 579):

> "*This language also indicates a congressional purpose to have the Board do something more than* merely *look at* prior Board orders and certifications or *a collective bargaining contract* to determine whether one or the other union has a clearly defined statutory or contractual right to have the employees it represents perform certain work tasks." (Emphasis added.)

There is no provision in the Railway Labor Act which even remotely is akin to § 10 (k) of the LMRA. As shown above, under the Railway Labor Act the jurisdiction of the Adjustment Board is limited solely to a determination of whether the collective bargaining agreement has been violated, while under § 10 (k) of the LMRA, the collective bargaining agreement merely is to be considered a factor in determining which of two groups of employees is entitled to an assignment of work.

[6] *Order of Railroad Conductors* v. *Pitney,* 326 U.S. 561 (1946).

[7] *Slocum* v. *Delaware, L. & W. R.R.,* 339 U.S. 239 (1950).

state courts. In each case, this Court held that exclusive primary jurisdiction to resolve disputes involving interpretations of agreements was in the Adjustment Board and not in the courts.

The Court of Appeals, however, relies on language by this Court in *Pitney* and *Slocum* that in determining the proper interpretation to be given to the collective bargaining agreements involved in those cases, the Adjustment Board must consider such evidence as usage, practice, and custom in the industry, and also any other agreements the railroad entered into with other unions. The Court below construed this language as an indication that the Adjustment Board was directed to consider both unions as parties to its proceedings and that the Adjustment Board must determine the rights under all agreements in one proceeding.

Even a cursory reading of these cases, however, shows that there is no basis for such construction. All this Court said in *Pitney* and *Slocum* was that the Adjustment Board was to consider all evidence including other agreements the railroad had with another union. The issue here, however, is not whether the Adjustment Board can consider the agreement between the Railroad and BRC; the issue is whether the existence of such other agreement (here, the BRC agreement) enlarges the jurisdiction of the Adjustment Board so as to require it to adjudicate not only the scope of the TCU agreement but also to adjudicate, in a manner binding on BRC, the meaning of the BRC agreement. The Court of Appeals decided that the existence of the agreement between the Railroad and BRC made BRC a party to the proceedings initiated by the claim of TCU and that the jurisdiction of the Adjustment Board was extended and required to be exercised to

adjudicate the meaning of the BRC agreement. TCU's contention is that the Adjustment Board's jurisdiction is not broadened by the existence of such agreements but that the Adjustment Board should consider other agreements merely as an aid in interpreting the agreement forming the basis of the claim. This Court in neither *Pitney* nor *Slocum* decided this issue.[8]

The only case in which this Court discussed the issue presented herein is *Whitehouse* v. *Illinois Central R. R.*, 349 U.S. 366 (1955).

The *Whitehouse* case also was commenced when TCU filed a claim with the Adjustment Board that the railroad had violated agreements between the parties by not assigning the work in question to employees it represented. The railroad there also had assigned the work to employees represented by BRC. Unlike the present case, however, BRC was not given notice of the proceedings before the Adjustment Board. Before the Adjustment Board could issue a determination, the railroad sought an injunction to restrain the Adjustment Board from deciding the dispute until notice was given.

One of the railroad's contentions was that notice to BRC was necessary so that the entire dispute could be settled at one time, thus securing the railroad against

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[8] This fact was emphasized in *Whitehouse* v. *Illinois Central R.R.*, 349 U.S. 366 (1955), wherein the Court stated (at 371-72):

> "Assuming the Act permits the Board to consider the claim of one union in light of competing agreements between Railroad and other unions, see *Order of Railway Conductors* v. *Pitney*, 326 U.S. 561, does it permit 'final and binding' awards to be rendered interpreting both contracts and resolving the independent claims of both unions in a single proceeding?"

The Court did not answer the question.

the possibility of awards to both unions since an award to TCU would not prevent BRC from prosecuting a similar claim successfully.

This Court rejected this contention, stating (*Whitehouse, supra,* at 372):

> "One thing is unquestioned. Were notice given to Clerks they could be indifferent to it; they would be within their legal rights to refuse to participate in the present proceeding. Clerks here have not attempted to intervene. They have merely stated an intention to bring a separate proceeding in case they are affected by an award in this case. Indeed Railroad refers to an understanding between Clerks and Telegraphers whereby the one will not intervene in proceedings initiated before the Board by the other, but will press its claims independently. . . . We would thus have to consider whether those potential injuries alleged to flow solely from failure of Clerks to participate may be the basis for judicial intervention where there is neither a legal right of the complaining party to be free from such injuries nor any assurance that judicial action will afford relief."

The Court of Appeals holding in this case that, "When a Board hearing is so held, and if proper notice be given to the Clerks, they would be bound by the Board's findings and order," clearly is inconsistent with this Court's statement in *Whitehouse* that even if notice were given to the Clerks it could be "indifferent to it" and could "refuse to participate" in the proceeding. Certainly this Court did not mean that the Clerks had the privilege to surrender its rights by default.

Furthermore, the holding of this Court in *Whitehouse* that the Adjustment Board could proceed with

its determination of TCU's claim with no requirement that the Adjustment Board simultaneously make a binding determination of the meaning of the BRC agreement, contrary to the decision of the Court below, shows that the existence of other agreements between the railroad and another union does not extend the jurisdiction of the Adjustment Board to require it to determine the scope of the other agreement and the rights of employees covered by that agreement.

The same result would be reached under common law in the absence of legislation.

In *Carey* v. *Westinghouse,* 375 U.S. 261 (1964), two unions subject to the Labor Management Relations Act (LMRA) were engaged in a dispute concerning the assignment of work. One of the unions claiming the work filed a grievance under its contract with the employer contending that its agreement with the employer covered the disputed work and requested that the grievance proceed to arbitration as required by the agreement.

The employer refused to proceed to arbitration on the ground that the grievance involved a jurisdictional dispute between two unions which should be resolved by the National Labor Relations Board pursuant to § 10(k) of the LMRA. This Court held that the employer was required to arbitrate the grievance. The Court stated (*Carey, supra,* at 265-66):

> "To be sure, only one of the two unions involved in the controversy has moved the state courts to compel arbitration. So unless the other union intervenes, an adjudication of the arbiter might not put an end to the dispute. . . . The case in its present posture is analogous to *Whitehouse* v. *Illinois Central R. Co.,* 349 U.S. 366, where a railroad

> and two unions were disputing a jurisdictional matter, when the National Railroad Adjustment Board served notice on the railroad and one union of its assumption of jurisdiction. The railroad, not being able to have notice served on the other union, sued in the courts for relief. We adopted a hands-off policy, saying, 'Railroad's resort to the courts has preceded any award, and one may be rendered which could occasion no possible injury to it.' *Id.*, at 373."

The present case differs from *Carey* only in that arbitration has taken place in the present case in the form of the proceeding before the Adjustment Board, while it was only prospective in *Carey*. Since the Court, in *Carey*, directed the parties to arbitrate the dispute, it may be assumed that the award of the arbitrator would be valid and subject to enforcement even though the other union was not a party to the arbitration. In *International Brotherhood of Firemen and Oilers* v. *International Association of Machinists*, 338 F. 2d 176 (5th Cir. 1964), the Court enforced the award of an arbitrator under the factual circumstances the same as were present in *Carey*. Similarly in the present case, the award of the Adjustment Board is valid, at least with respect to any procedural requirement.

Moreover, similarly here, as in *Carey*, this Court's holding that arbitration must proceed despite the absence of the other union, shows that the existence of other agreements between the railroad and other unions does not require a determination, in this case, of the scope of those other agreements nor a determination of the rights of employees under such agreements.

II. This Case Presents an Important Question of Statutory Construction Which Ought To Be Decided by This Court, and Has Been Decided by the Court Below in a Manner Contrary to the Way This Court Has Indicated That It Should Be Decided

As discussed, *supra,* in point I, the issue in this case involves an interpretation of the provisions of the Railway Labor Act which created the National Railroad Adjustment Board for the resolution of so-called "minor" disputes.[9] At issue is the jurisdiction of the Adjustment Board and the procedure to be followed by it in determining disputes arising from claims that a railroad has assigned work in violation of collective bargaining agreements.

On numerous occasions in the past, the Adjustment Board and the courts have been called upon to determine controversies arising from a railroad's assignment of work where there existed potentially "overlapping contracts" between the railroad and two unions.[10] In *Whitehouse* v. *Illinois Central R. R., supra,* the issue involved was whether the Adjustment

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[9] A "minor" dispute has been defined by this Court as one which:

> ". . . contemplates the existence of a collective agreement already concluded or, at any rate, a situation in which no effort is made to bring about a formal change in terms or to create a new one. The dispute relates either to the meaning or proper application of a particular provision with reference to a specific situation or to an omitted case." *Elgin, J. & E. R.R.* v. *Burley,* 325 U.S. 711, 723 (1945).

[10] See for example, *The Order of R.R. Telegraphers* v. *New Orleans T. & M. Ry.,* 229 F. 2d 59 (8th Cir. 1956), *cert. den.* 350 U.S. 997; *Whitehouse* v. *Illinois Central R.R.,* 349 U.S. 366 (1955); *Allain* v. *Tummon,* 212 F. 2d 32 (7th Cir. 1954); *Brotherhood of R.R. Trainmen* v. *Templeton,* 181 F. 2d 527 (8th Cir. 1950); *Order of R.R. Conductors* v. *Pitney,* 326 U.S. 561 (1946); *Nord* v. *Griffin,* 86 F. 2d 481 (7th Cir. 1936).

Board was required to give notice to persons not formal parties to a submission to the Adjustment Board. This Court found the issue presented a "perplexing problem" and stated (349 U.S. at 370):

> "We granted certiorari because serious questions concerning the administration of the Railway Labor Act are in issue."

The issue in the present case presents even more "serious questions" since here notice was given to the BRC (not a party to the submission) yet the Court below nonetheless invalidated the Adjustment Board's determination on the ground that it was not sufficient to give notice to BRC but that the Adjustment Board also was required to determine the scope of BRC's agreement. As we showed in point I, *supra,* the Court of Appeals' decision is contrary to that indicated by this Court in *Whitehouse.*

It is thus vitally important to the continued orderly administration of the Railway Labor Act that the jurisdiction of the Adjustment Board in this area be clearly defined.

CONCLUSION

For the foregoing reasons it is respectfully urged that this Court should issue a writ of certiorari to review the decision below.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 7968 — MARCH 1965 TERM

THE ORDER OF RAILROAD TELEGRAPHERS, *Appellant*,

v.

UNION PACIFIC RAILROAD COMPANY, *Appellee*.

Appeal From the United States District Court for the District of Colorado

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James A. Wilcox, Omaha, Neb. (E. G. Knowles, Clayton D. Knowles, Denver, Colo., and Harry Lustgarten, Jr., Omaha, Neb., with him on the Brief), for Appellee.

Before MURRAH, Chief Judge, LEWIS and SETH, Circuit Judges.

SETH, Circuit Judge.

This is an appeal from an order of the United States District Court for the District of Colorado, dismissing the appellant's petition for enforcement of an award of the National Railroad Adjustment Board for failure to join an indispensable party.

The case before us is but another episode in the long-standing jurisdictional struggle between the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees ("Clerks"), and the Order of Railroad Telegraphers ("Telegraphers"). For a detailed history of the origins of this dispute, see Order of Railroad Telegraphers v. New Orleans, T. & M. Ry., 61 F. Supp. 869 (E. D. Mo.), *vacated and remanded* 156 F.2d 1 (8th Cir.), *cert. den.* 329 U.S. 758.

The facts in the controversy before the Board insofar as they are pertinent here are as follows: The dispute grew out of the action of the Union Pacific in 1952 in installing electronic equipment in its various yard offices, including the one at Las Vegas, Nevada, which brought about radical changes in the carrier's car record procedures. In the operation of these machines, a communication function previously performed by the Telegraphers is apparently automatically performed by employees represented by the Clerks. Since the basic function of the machines is to handle clerical work, the job of punching the program cards and operating the machines was assigned to clerical employees. As a result of such action the Telegraphers filed a complaint with the Adjustment Board under 45 U.S.C.A. §§ 151-188.

The Telegraphers' claim before the Board was that the carrier had violated its collective bargaining agreement with the Telegraphers by assigning the work referred to to the Clerks. They prayed that for such violations the carrier be ordered to compensate those employees represented by the Telegraphers to whom the work should have been assigned. In compliance with 45 U.S.C.A. § 153, First (j), the Board served notice upon the Clerks as "employees ... involved in any disputes submitted to them [the Board]." In reply, the President of the Clerks sent a letter to the Board stating the Clerks' position that the dispute was solely between the carrier and the Telegraphers, involving interpretation of the agreement between

the two, and that the Clerks would not therefore participate in the proceedings before the Board. However, the letter added that if as a result of the proceedings before the Board, work belonging to the Clerks was taken away from them by the carrier, the Clerks would take appropriate action in separate proceedings before the Board.

The proceedings before the Board resulted in an award in favor of the Telegraphers against the carrier, and the carrier was ordered to compensate idle employees covered by its agreement with the Telegraphers. Upon the carrier's failure to comply with the award, the Telegraphers filed this action for enforcement in the District Court for the District of Colorado under 45 U.S.C.A. § 153, First (p). The carrier filed a motion to dismiss the enforcement action on the grounds the Telegraphers had failed to join an indispensable party, namely the Clerks. The court granted the motion and ordered that the Telegraphers should have thirty days from the date of the order to file an amended complaint. Upon failure of the Telegraphers to do so the court entered final judgment of dismissal with prejudice. It is from this judgment that the Telegraphers appeal. The memorandum opinion and order granting the motion to dismiss with leave to file an amended complaint may be found at 231 F. Supp. 33.

The jurisdiction of the National Railroad Adjustment Board is as set out in the Railway Labor Act, 45 U.S.C.A. § 153, First (i). This subsection provides that the appropriate division of the Adjustment Board shall have authority over disputes between the employees and a carrier arising from interpretation or application of collective bargaining agreements and grievances arising out of such contracts. Thus the Board is empowered to hear disputes which arise from grievances, from the interpretation or from the application of contracts. See Elgin, J. & E. Ry. v. Burley, 325 U.S. 711, 327 U.S. 661.

In the case at bar we are concerned with an interunion dispute. Two important cases of this character which have

been considered by the Supreme Court are Slocum v. Delaware, L. & W. R.R., 339 U.S. 239, and Order of Railway Conductors v. Pitney, 326 U.S. 561. There have also been a number of similar disputes which are considered in the opinions of the United States Court of Appeals in several Circuits. These cases all basically involve a dispute between two labor unions as to which group is entitled to particular jobs under their individual contracts with the railroad. These positions have come into dispute for the most part, as did the positions in the case at bar, by reason of certain technological changes. We must consider by reason of the above decisions that the authority of the Adjustment Board has been established to entertain disputes of this character.

In the case at bar, under the existing decisions, it was necessary that the Adjustment Board give notice to the Clerks, and this was done as mentioned above. The National Railway Labor Act provides that notice be given to a party "involved" [45 U.S.C.A. § 153, First (j)]. The Act however also provides [45 U.S.C.A. § 153, First (m)] that the award shall be binding on "both" parties, and in subsections (o) and (p) reference is made only to the "carrier" and to the "petitioner." Thus the Act in some respects contemplates that there be but two parties, and the word "involved" in subsection (j) could be construed to refer to only one of these two parties. 9 Stan. L.Rev. 820. However it has now become established that under the circumstances existing in this case, notice is required to be given to the Clerks Union. See, *e.g.*, Order of Railroad Telegraphers v. New Orleans, T. & M. Ry., 229 F.2d 59 (8th Cir.), *cert. den.* 350 U.S. 997; Allain v. Tummon, 212 F.2d 32 (7th Cir.); Hunter v. Atchison, T. & S. F. Ry., 171 F.2d 594 (7th Cir.), *cert. den.* 337 U.S. 916. Some courts have grounded this requirement on due process, while others have not placed it on a constitutional basis but have nevertheless made it a requirement. The court, in Order of Railway Telegraphers v. New Orleans, T. & M. Ry., supra, held in part that an Adjustment Board's award was void

for failure to give notice to the Clerks, who were there "involved" as they are here. The Supreme Court in Whitehouse v. Illinois Central R.R., 349 U.S. 366, considered a similar dispute between the Clerks and Telegraphers. Before the Board acted the carrier brought a separate action in the court to enjoin the Board from acting until notice was given the Clerks, the non-petitioning union. The Supreme Court as dicta mentioned the "substantial agreement among Courts of Appeal which have considered the question in holding that notice is required ...", but indicated it was not a constitutional question. This issue is fully covered in the trial court's opinion in the case at bar at 231 F. Supp. 33.

It is however apparent that the requirement that notice be given to the competing union in disputes of this character must be derived from the scope and nature of the issues before the Board. When the Board undertakes to enter the field of jurisdictional disputes as it has done, it is apparent that the issues considered in each petition must necessarily concern at least one other union in addition to the one filing a petition. This "concern" is a very real one by reason of the obvious fact that there is but one job or classification which is sought for the members of two different and competing unions. Since the issues are of this nature, it is understandable that it would be required that notice be given to the non-petitioning union. There is thus an interrelation of notice, parties, and issues. The requirement of notice in the statute and developed in the decisions is a clear indication or measure of the proper scope of the issues before the Adjustment Board, regardless of what procedural or evidentiary limitations it may impose.

The record in this case shows that the Board considered the contract of the petitioning union as if the contract with the non-petitioning union purportedly covering the same job does not exist at all. The jurisdictional dispute was thus decided in a piecemeal manner, the Board osten-

sibly acting under its jurisdiction to interpret a contract between a carrier and a union. Other contracts for what appeared to be the same jobs were excluded by its rules of evidence. The Supreme Court in a case concerned with the matter of notice and of primary jurisdiction of the Board said:

> "We have seen that in order to reach a final decision . . . the court first had to interpret the terms of O.R.C.'s collective bargaining agreements. The record shows, however, that interpretation of these contracts involves more than the mere construction of a 'document,' in terms of the ordinary meaning of the words and their position . . . *For O.R.C.'s agreements with the railroad must be read in the light of others between the railroad and B.R.T. And since all the parties seek to support their particular interpretation of these agreements by evidence as to usage, practice and custom, that too must be taken into account and properly understood.* The factual question is intricate and technical. An agency especially competent and specifically designated to deal with it has been created by Congress. Under these circumstances the court should exercise equitable discretion to give that agency the first opportunity to pass on the issue." Order of Railway Conductors v. Pitney, 326 U.S. 561 (citations omitted and emphasis added).

This statement is most important in the case at bar because the Supreme Court in the cited case, and in Slocum v. Delaware, L. & W. R.R., 339 U.S. 239, has recognized the authority of the Board to consider these jurisdictional-contract disputes and should be taken as an indication as to how it should be done. If we are to consider that the Board has authority over this dispute, it must exercise it over the whole dispute at one time, not half at one time with one set of participants, and half at another. The notice requirement whatever its basis, and the Supreme

Court's statements in Order of Railway Conductors v. Pitney, 326 U.S. 561, that the contracts of one must be read in the light of the other, lead to the conclusion that the fundamental issues before the Board included those pertaining to the Clerks and to their contract. Their claim to the same jobs requires that the Telegraphers' contract and position be examined in the light thereof before the dispute can be realistically settled. The Clerks for all practical purposes thereby become parties to the administrative proceedings.

The record before us is thus incomplete by reason of the Board's failure to conduct the hearing in a manner so as to receive evidence and to construe the Telegraphers' contract with regard to, and with reference to the Clerks' position and contract. Thus it is necessary that the case be remanded to the Board in order that a complete hearing may be had to include all issues, practice, and usage, including the effect of the Clerks' contentions and contract, which are necessary to a complete disposition of the dispute as to all concerned parties. The Board has primary jurisdiction, and must make this initial determination before a court can act on a complete proceeding, should it be requested to do so. Slocum v. Delaware, L. & W. R.R., 339 U.S. 239; Order of Railway Conductors v. Pitney, 326 U.S. 561. When a Board hearing is so held, and if proper notice be given to the Clerks, they would be bound by the Board's findings and order.

The order of the National Railroad Adjustment Board is vacated and set aside. The case is remanded to the United States District Court for the District of Colorado with directions to further remand the case to the Board in accordance herewith.

APPENDIX B

Judgment

Eighth Day, July Term, Thursday, July 22nd, 1965.

Before Honorable Alfred P. Murrah, Chief Judge, and Honorable David T. Lewis and Honorable Oliver Seth, Circuit Judges,

This cause came on to be heard on the transcript of the record from the United States District Court for the District of Colorado and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the order of the National Railroad Adjustment Board is vacated and set aside. The case is remanded to the United States District Court for the District of Colorado with directions to further remand the case to the Board in accordance with the opinion of the court. It is further ordered that The Order of Railroad Telegraphers, appellant, have and recover of and from Union Pacific Railroad Company, appellee, its costs herein and have execution therefor.

APPENDIX C

Railway Labor Act (Pub. No. 257, 69th Cong., appd. May 20, 1926, 44 Stat. 577, as amended by Pub. No. 442, 73rd Cong., appd. June 21, 1934, 48 Stat. 1185), 45 U.S.C., ch. 8; U.S.C.A., Title 45 secs. 151-164.

Section 153, First (i):

> "The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act, shall be handled in the usual manner up to and including the chief operat-

ing officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes."

Section 153, First (j):

"Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them."

Labor Management Relations Act (Pub. No. 101, 80th Cong., appd. June 23, 1947, 49 Stat. 136), 45 U.S.C., ch. 7; U.S.C.A., Tit. 29, secs. 151-168.

Section 160 (k):

"Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(D) of section 158(b) of this title, the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the disputes . . . ."